

Department of Homeland Security Tribal Consultation Policy

I. Introduction

A. The United States Government has a unique legal and political relationship with American Indian and Alaska Native Tribal Governments as set forth in the Constitution of the United States, treaties, statutes, court decisions, executive orders, and memoranda. The United States recognizes the right of Federally-recognized Indian Tribes (“Indian Tribes”) to self-government. Indian Tribes exercise inherent sovereign powers over their members and territories.

B. The Department of Homeland Security (DHS) is committed to strengthening the government-to-government relationship between the United States and Indian Tribes. DHS recognizes that agency policies, programs, and services may directly or indirectly impact Indian Tribes and is committed to regularly and meaningfully collaborating, communicating, and cooperating with Indian Tribes with regard to policies that have Tribal Implications.

D. Thus, in accordance with Presidential Memoranda issued in 1994, 2004, and 2009 and Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments,” (Nov. 9, 2000), 65 *Fed. Reg.* 67,249, DHS adopts this DHS Tribal Consultation Policy.

E. This DHS Tribal Consultation Policy outlines the guiding principles under which DHS is to engage with governments of Indian Tribes. The DHS Tribal Consultation Policy is intended to be continually updated and refined to reflect our ongoing engagement and collaboration with Tribal partners.

II. Definitions

A. “Communication” refers to the verbal, electronic, or written exchange of information between DHS and Indian Tribes.

B. “Consultation” involves the direct, timely, and interactive involvement of Indian Tribes regarding proposed Federal actions on matters that have Tribal Implications.

C. “Exigent Situation” refers to an unforeseen combination of circumstances or the resulting state that calls for immediate action in order to enforce or uphold the law; to provide for the national defense; or to preserve life, health, national security, national resources, tribal resources, property, rights, or interests.

D. “Indian Tribe” refers to an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian Tribe pursuant to the *Federally Recognized Indian Tribe List Act of 1994*, 25 U.S.C. 479a.

E. “Tribal Government” refers to the recognized body of an Indian Tribe, including any Alaska Native Village defined in or established pursuant to the *Alaska Native Claims Settlement Act* (85 Stat. 688).

F. A “Tribal Implication” exists when a DHS policy or action causes a substantial direct effect on 1) the self-government, trust interests, or other rights of an Indian Tribe; 2) the relationship between the Federal Government and Indian Tribes; or 3) the distribution of rights and responsibilities between the Federal Government and Indian Tribes.

III. Consultation with Tribal Governments

A. To the greatest extent practicable, subject to Exigent Situations and to the extent permitted by law, DHS will engage in Consultation with affected Tribal Governments prior to adopting policies or taking actions that are identified by DHS as having Tribal Implications.

B. As part of the Consultation process, DHS will take the following affirmative steps:

(i) Solicit input from Tribal Governments of Indian Tribes for which DHS has identified a Tribal Implication, taking into account the scope of the policy in question, the timeline for final decision-making, and any other relevant criteria.

(ii) Notify appropriate Tribal Governments of DHS’s desire to engage in Consultation. Notice should be given as early in DHS’s decision-making process as reasonably possible, preferably in writing, and with sufficient detail about the proposed actions or policies that have Tribal Implications.

(iii) Incorporate the input received from the Tribal Governments into DHS’s decision-making process.

(iv) Communicate DHS decisions to the Tribal Governments engaged in the Consultation.

The steps listed above provide general principles to guide engagement; the specific manner in which DHS and the Indian Tribes engage in Consultation will be flexible in recognition of the uniqueness of each Indian Tribe and the wide range of Federal actions that may warrant Consultation. In many cases, Consultation will most appropriately occur between officials of Tribal Governments and DHS personnel at the local level. In some cases, particularly with regard to policies or actions of national scope, Consultation may warrant national meetings, special work groups, or other mechanisms as determined by DHS and the impacted Tribal Governments in order to best foster productive communication.

C. The Office of Intergovernmental Affairs will coordinate and support implementation of the DHS Tribal Consultation Policy across the Department. Each DHS operating component shares in the Department-wide responsibility to fully engage in Consultation over Tribal Implications of DHS policies and actions. While much of the contact between Indian Tribes and DHS will occur at the local level, the DHS Office of Intergovernmental Affairs serves as the

central point of contact at DHS for engagement with Indian Tribes. Each DHS component must have a designated tribal liaison as required by the DHS Memo, *Designation of Component Tribal Liaisons*, dated November 3, 2009.

D. As appropriate, DHS will take steps to implement and streamline processes by which Tribal Governments may apply for waivers of statutory and regulatory requirements.

E. Consultation can be initiated by either DHS or by a Tribal Government.

IV. Applicability of the Federal Advisory Committee Act

The provisions of the *Federal Advisory Committee Act* (5 U.S.C. App.) (FACA) do not apply to Consultations undertaken pursuant to this DHS Tribal Consultation Policy with Tribal Governments. In accordance with section 204(b) of the *Unfunded Mandates Reform Act of 1995* (Pub.L. 104-4, approved March 22, 1995), FACA is not applicable to Consultations between the Federal Government and elected officers of Tribal Governments (or their designated employees with authority to act on their behalf).

V. General Provisions

A. DHS will periodically consult with Tribal Governments to review the effectiveness of this DHS Tribal Consultation Policy and make revisions as necessary.

B. This document has been adopted for the purpose of strengthening government-to-government relationships, communications, and mutual cooperation between DHS and Tribal Governments. This document is not intended to, and does not, create any right to administrative or judicial review, or any other right or benefit or trust responsibility, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other persons. This document is effective on the date it is signed.

C. DHS adopts this DHS Tribal Consultation Policy pursuant to Executive Order 13175. This DHS Tribal Consultation Policy does not replace or change any existing Co-obligations of DHS under the *National Environmental Policy Act*, the *National Historic Preservation Act*, Section 102 of the *Illegal Immigration Reform and Immigrant Responsibility Act*, or any other statute.